

IN THE HIGH COURT OF BOMBAY AT GOA, PANAJI-GOA

SECOND APPEAL NO. 16 OF 1998

Shri Ramchandra Vaman
alias Gopal Naik Ganto,
Since deceased represented
by his legal representatives

- 1(a) Smt. Neeta Ramchandra Naik Ganto,
major, son of the deceased
- 1(b) Shri Abhay Ramchandra Naik Ganto,
major, son of the deceased
- 1(c) Kum. Sangeeta Ramchandra Naik Ganto,
major, daughter of the deceased
- 1(d) Kum. Kunda Ramchandra Naik Ganto,
major, daughter of the deceased;
- 1(e) Kum. Jyoti Ramchandra Naik Ganto,
major, daughter of the deceased,

all residing at Dongari, Tiswadi, Goa.

.... Appellants

Versus

- 1. Subhash V. Adarkar,
residing at Oddlem Bhat, Dongrim.
- 2. Sandeep V. Adarkar,
resident of Oddlem Bhat, Dongrim.
- 3. Prassad V. Adarkar,
resident of Odlem Bhat, Dongri.
- 4. Suresh Datta Bhomkar (since deceased)
r/o Dhaktembhat, Dongri, Tiswadi, Goa.

4(a) Sumitra Suresh Bhomkar,
widow of Suresh Bhomkar,

4(b) Kum. Shivdatt S. Bhomkar,
son of Suresh Bhomkar,

4(c) Kum. Sudeep S. Bhomkar,
son of Suresh Bhomkar.

All residents of Dongrim, Mandur,
Dhaktem-Bhat, P.O. Neura,
Ilhas, Goa.

5. Devu Datta Bhomkar,
resident of Dhaktembhat, Dongri,
Tiswadi, Goa.

6. Datta Bhomkar,
resident of Dhaktembhat, Dongri,
Tiswadi.

.... Respondents.

Shri S.D. Lotlikar, Sr. Advocate with Shri M. De Souza, Advocate for the
Appellants.

Shri J.P. Mulgaonkar, Advocate for Respondents No. 4(a), 5 & 6.

CORAM : P.V. KAKADE, J.

DATE : 9th NOVEMBER, 2006.

ORAL JUDGMENT:

Heard both sides. Perused the record.

2. The unsuccessful plaintiff has preferred this appeal against the judgment and order passed by Additional District Judge, Panaji dismissing his appeal and confirming the judgment and order passed by the trial Court dismissing the plaintiff's suit for permanent injunction, possession and recovery of rent against the defendants/respondents.

3. The facts involved in the dispute in brief are thus;

The plaintiff came with a case that in his property at Dongri, there was a grocery shop constructed by his father late Vaman Ganto and run the same till it was leased to the defendant no.1 @ Rs. 15/- per month and the said shop was registered in the records of Village Panchayat of Dongri. The property was recorded in the name of plaintiff's father till the year 1971 and after the death of plaintiff's father in the year 1970, the defendant no.1 closed the said shop and did not pay the rent despite of demands made to him. Plaintiff submitted that defendants no. 2 to 4 were running the shop and also carrying out illegal construction and, therefore, the cause of action arose for the suit. The defendants contested the suit for injunction and possession and other consequential reliefs.

4. The defendants contested the suit, inter alia, denying all the

allegations made by the plaintiff. It was contended that plaintiff's father had constructed the suit house for running grocery shop, 40 years ago prior to filing of the suit and plaintiff's father closed down the suit shop due to financial difficulties. Defendant no.1 approached plaintiff's father and requested him to give on lease the suit shop and, accordingly, defendant no.1 was given the suit shop on lease, about 20 years ago from the date of filing of the suit by the plaintiff's father and defendant no.1 paid the rent till his death. Defendant no.1 promised to pay the rent on restarting the shop. The shop was restarted in the year 1975 and the defendant no.1 promised but never paid. In the year 1977 plaintiff saw defendants no.3 and 4 replacing tiles of the suit house and, therefore, on questioning them they informed that defendant no.1 had asked them to do so. It is further the case sought to be made out by the defendants that defendants no. 2 & 3 are brothers and defendant no.4 is the father and, therefore, since all of them are not joined to the suit, the suit is bad for non-joinder of the parties. In his written statement defendant no. 1 clearly admitted that late Vaman Ganto was the owner of the suit property and with his permission defendant no.1 had constructed the suit shop/house at his own exclusive costs for running the grocery shop. In the year 1971, defendant no.1 became sick and physically incapacitated to run the said shop and, therefore, he decided

to sell the suit structure and defendant no.2 agreed to purchase it and the transactions took place for Rs. 900/- and since then defendant no.2 started to run the said grocery shop. On such and other grounds, the suit was sought to be dismissed.

5. The learned trial Judge after recording the evidence and hearing both the parties came to the conclusion that defendant no.1 succeeded in proving that in the year 1941, he, with the permission of Vamon Ganto constructed the suit house at his own exclusive costs. It was further held that plaintiff failed to prove that defendants had demolished the wooden gallery of the suit house and replaced it by a wall of masonry stones. The trial Court further held that plaintiff had succeeded in proving that his father had leased the suit house to defendant no.1 at the rent of Rs. 15/- per month. Certain additional issues also were framed, whereby it was held that the defendant no.1 had proved that he had sold the suit house to defendant no. 2 for a consideration of Rs. 900/- and at present defendant no.2 was in peaceful possession of the suit house. Ultimately, the suit of the plaintiff came to be dismissed.

6. The appeal was preferred to the District Court and the learned

Additional District Judge after hearing both the parties and on the basis of available evidence came to the conclusion that the findings recorded by the learned trial Judge on the basis of evidence were legal and proper and, therefore, appeal came to be dismissed.

Hence, the present appeal.

7. It may be noted that while admitting this appeal two substantial questions of law were raised by the admission Court. One was to the effect that whether the suit instituted by the appellants for eviction of the respondents from the suit house, was liable to be decreed in view of the stand taken by the respondents in their written statement, namely, that the respondent no.1 had constructed the suit house with the permission of the father of the original plaintiff and he had transferred the same to the respondent no.2. Another issue which was raised was in respect of obtaining perfection of title of the defendants by virtue of adverse possession. However, in this regard, it must be noted that at this juncture, that issue regarding adverse possession cannot be raised in this dispute, firstly, because none of the defendants have raised that issue as a defence and secondly, such issue was not raised by Courts below for their consideration and there was no pleading to that effect on record. Moreover,

as it is well settled law that issue of title by adverse possession is purely a question of fact and could not be a substantial question of law at any rate and, therefore, we need not address ourselves to the said issue. It appears that it was raised at the time of admission, only due to the reason that there were some stray observations made by the trial Court in the course of the judgment.

8. The only issue to be addressed in this appeal therefore is, whether, inspite of the fact that no specific issue was raised by the Courts below, the suit could be decreed on the basis of specific defence taken by the defendant no.1 in his written pleadings i.e. written statement.

9. Now, if we peruse the written statement of defendant no.1, he has categorically stated in para 1 that late Vaman Ganto i.e. the father of the present plaintiff/appellant was owner in possession of the landed property mentioned in para 1 of the plaint and defendant had constructed the suit structure in the land belonging to said Ganto at his own and exclusive costs for running the grocery shop. It is also the defence of the defendant no.1 that since the year 1971, he was not in proper health and, therefore, sold this suit structure to defendant no.2 for a consideration of

Rs. 900/- and since then defendant no.2 is running the grocery shop in the property. These aspects clearly show that the status of defendant no.1 was that of the licensee in the suit land, and structure was raised with the permission of late father of the plaintiff. The record further shows that the present plaintiff is the legal heir of late Vaman Ganto and, therefore, rightful owner of the suit land who is seen to have terminated the licence of defendants in proper manner. It is further on record that defendant no.1 has sold the property to defendant no.2 for a consideration of Rs. 900/- as per his own admission. Now, the question arises whether defendant has any right title and interest in the suit property to transfer title to defendant no.2 which was vesting in him? In other words, there is no doubt, whatsoever, so far as legal position is concerned to the effect that defendant no.1 had no ownership title in the suit property and, therefore, it could not be transferred in favour of defendant no.2 and as such, such transfer was bad in law. If that is the position apparent from the record and admitted by the defendant himself, then in my view the record which is apparent, is sufficient to determine the fate of the dispute itself, without raising any specific issue as it is seen in the present case. It is quite obvious that this aspect has skipped the attention of both the Courts below and, therefore, they did not address the issue in question at all.

10. Mr. Mulgaonkar, the learned Counsel for the respondent vehemently urged that when there was no specific pleading to that effect and no specific issue was raised in that regard, the fate of the suit cannot be changed in the face of the concurrent findings recorded by both the Courts below. However, in that regard, the learned Counsel for the appellant put reliance on the ruling of Supreme Court in the case of ***Firm Srinivas Ram Kumar Versus Mahabir Prasad and others*** (AIR (38) 1951 SC 177). Said ruling lays down the legal propositions, those are;

'A plaintiff may rely upon different rights alternatively and there is nothing in the C.P.C. to prevent a party from making two or more inconsistent sets of allegations and claiming relief thereunder in the alternative. Ordinarily, the Court cannot grant relief to the plaintiff on a case for which there was no foundation in the pleadings and which the other side was not called upon or had an opportunity to meet. But when the alternative case, which the plaintiff could have made, was not only admitted by the defendant in his written statement but was expressly put forward as an answer to the claim which the plaintiff made in the suit, there would be nothing improper in giving the plaintiff a decree upon the case which the defendant himself makes. A demand of the plaintiff based on the defendant's own plea cannot possibly be regarded with surprise by the latter and no question of adducing evidence on these facts would arise when they were expressly admitted by the defendant in his pleadings. In such circumstances, when no injustice can possibly result to the defendant, it may not be proper to drive the plaintiff to a separate suit.'

Therefore, there is no doubt whatsoever that irrespective of the fact that no specific issue was raised in that regard when there is a pleading on record which is sufficient to go to the root of the matter in order to determine the fate of the entire dispute, then the Court is not prevented from doing justice on the basis of admission of the defendant in his own pleadings. It was further submitted on behalf of the respondent that in such cases, the matter should be remanded to the trial Court for raising such issues and to give opportunity to the parties to lead evidence in that regard. However, in the face of clear cut admission of the written statement made by the defendant no.1, no purpose would be served by remanding the matter to the trial Court for raising issues and adjudicating thereof, especially when defendant would be bound by the pleadings already adopted and filed by him and, therefore, he would not be in a position to lead any evidence, contrary to his own pleadings which are in the nature of clear admission that he is a licensee in the property and has sold the said property to defendant no.2 for a consideration of Rs. 900/-, which I hold is not allowed in law.

11. In the result, I have no hesitation to hold that both the Courts below have over looked the aspects discussed above in this dispute, which are sufficient to determine the fate of the dispute and, hence, I hold that the

plaintiff/appellant is entitled to succeed in this matter.

12. In the result, the rule is made absolute and the appeal is allowed in terms of prayer clause 1 & 2. The judgments and orders passed by the lower appellate Court as well as trial Court are hereby set aside and the suit of the plaintiff/appellant stands decreed with no order as to costs.

P.V. KAKADE, J.

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